

SECRET AUSTEO



Chief of the Defence Force

MINUTE



CDF U2/02

Minister For Defence

For Action by 25 Jan 2002 (Special Forces commence deployment on Operation ANACONDA on this date)

OPERATION SLIPPER - TREATMENT OF CAPTURED TALIBAN AND AL QA'EDA PERSONNEL

RECOMMENDATION

- That you note the lack of clear Government policy on dealing with captured personnel and that the current guidance to Special Forces, soon to be engaged in Operation ANACONDA, is for any captives to be handed over to US authorities.

material exempt

- That you approve the following immediate interim arrangements and actions for management of any personnel captured by ADF forces:

- Defence to urgently seek US agreement to move any captives from the scene of operations to Kandahar under ADF supervision and to permit the ADF to use the US detention facility to hold personnel captured by the ADF under Australian supervision.

- The ADF to deploy a team of specialists to the detention facility to take over the supervision of any personnel captured by the ADF from Special Forces at the earliest opportunity.

- COMAST holds the view that the above will be difficult to achieve, but this not considered to be impossible.

- If the US declines to transport or assist Australia in the holding of captives under ADF supervision but the US is willing to accept custody on US terms (or if a capture occurs before the arrangements are in place), the Government may direct the ADF to continue operations.

material exempt

and domestic law

- That you advise Government that the Attorney General, as the principal legal adviser to the Government, would have the primary legal role in determining the legal status of any captive and assisting in any subsequent tribunal action following from the determination.

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- That you urgently seek a whole of Government policy for the handling of Taliban and al Qa'eda personnel captured by ADF personnel. This policy may have implications for any future operations beyond Afghanistan, should they occur. The policy will require AGs, DFAT, PM&C and Defence agreement. AGs should have prime carriage of this issue.

OVERVIEW

- There is currently no clear government policy on the handling of personnel who may be captured by the ADF on Operation SLIPPER. There is an IDC examining this issue, but it is currently in danger of drifting between departments. Defence, and in particular ADF commanders, are currently accepting the risk flowing from the lack of government policy.
- Australian Special Forces in Afghanistan are planned to participate in Operation ANACONDA (a Tier 1 Task) conducting screening and out off operations. The nature of the tasking for Operation ANACONDA indicates a higher likelihood that captives might be taken than on previous missions. Special Forces deploy 25 Feb 02 to be in position for operations (28 Feb - 4 Mar 02).
- COMAST has advised that there is no practicable way of Australia transporting or holding captives independently in theatre.
- The Australian position on operations in Afghanistan up until now has been that Laws of Armed Conflict apply. Although the situation in Afghanistan is evolving, including the establishment of an interim government authority and a UN peace-keeping force, the prevailing view across Commonwealth Departments is that the situation is still one of international armed conflict and laws of armed conflict continue to apply.
- The Minister has agreed publicly (London 15 Jan 02) that Australian forces are "expected to abide by the Geneva and other international conventions if they take captives".
- Captives will fall into three categories:
 - AS Citizen captured by other national armed forces: Defence will use its' good offices with members of the coalition against terrorism to facilitate access by the appropriate AS Government officials.
 - AS Citizen captured by AS forces: Captives will be handled in accordance with Australian Government approved processes which are yet to be determined.
 - Non AS Citizen captured by AS forces: Defence will seek to have the US transport the captives from the scene of operations under ADF supervision and to permit the use of the US detention facility at Kandahar to hold captives under ADF supervision in accordance with AS/US Government procedures, yet to be agreed.

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- [Exempt] have used the arrangement of having a US soldier or an Afghan with patrols, arguing that while [Exempt] are involved in the capture of personnel the formal captor is either the US or the Afghans. Such an arrangement may not fully satisfy Australia's legal obligations and in any event will not be viewed as promoting respect for the rule of law.

Proposed Arrangements for Captives - Australian Custody and Control

- This proposal requires establishment of an Australian capacity within the theatre of operations to hold captives until status is determined. Australian Military Police and other specialists are trained and capable of this function but have not yet been deployed. This proposal would be consistent with Australia's international law obligations.
- The practical solution is for the US to allow ADF use of detention facilities at Kandahar to hold personnel captured by the ADF under Australian supervision. Military police and other specialists would need to be deployed to support this option. Deployment of a handling capability for personnel captured by the ADF would be expensive and resource intensive if large numbers of captives were captured, however, Australian forces are unlikely to capture large numbers of captives.

[Exempt]

- Determination of captive status and subsequent action should be done as soon as possible by the Attorney General as the Government's legal adviser. DFAT and Defence may provide some assistance, if necessary, but forming a tribunal and determining the status of captives is an Attorney General responsibility.

[Exempt]

- A summary of the legal discussion concerning Australia's international legal obligations relating to handling of captives is at Annex A.

CONSULTATION

- AGS, COMAST, HSC, DSOF, DGTDLS, SIP

NO CONSULTATION (due to title constraints)

- PM&C, DFAT

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Sensitivity: Yes.

- Australia's position regarding the treatment of captives is of considerable interest to its coalition partners (particularly the US), the United Nations, International Committee of the Red Cross, NGOs concerned with human rights, political and legal commentators and to the media.
- Difficulties will arise in the event that ADF takes captives before national policy is available.

Material exempt

AUTHORISED: [Signature] AGREED/NOT AGREED

C. A. Barrie
 C.A. BARRIE
 ADML, RAN
 CDF
 25 FEB 02

I don't understand why I didn't get the brief before the Afghanistan operation. we clearly should have sorted out this 102 issue with the U.S. as leader of the coalition months ago.

ANNEX:

A. LEGAL DISCUSSION -- HANDLING OF CAPTIVES

prisoners. we must abide by our domestic & international obligations.

CONTACT: BRIG M. McNam DOJOP: 6265 0026

Copies : Secretary, VCDF, DEPSEC SP, CN, CAP, CA, HSC, DEPSEC I+S, FASSIP, HPGA, COMAST, HPACC, DQDLS.

If we capture these prisoners we will need the support of the U.S. as we don't have facilities to hold them. we will then have to determine their status & how we will deal with them.

urgently
 I do agree that you should put to the U.S. what you have in mind.

for determining a whole of govt. policy

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I presume that was the purpose of the workshop. I suggest

R. M. Idj. U
25/2/02

you ~~submit~~ *submit* me a submission that I can take to NSC.